

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of:	)	
	)	
Streamlining Deployment of Small Cell	)	WT Docket No. 16-421
Infrastructure By Improving Wireless Facilities	)	
Siting Policies;	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	
	)	

**REPLY COMMENTS OF THE CITY OF BLOOMINGTON, MINNESOTA**

By Public Notice published December 22, 2016,<sup>1</sup> the Federal Communications Commission (“Commission”) seeks comments in response to a Petition for Declaratory Ruling.<sup>2</sup> The City of Bloomington, Minnesota, submits these reply comments to (1) explain how the City of Bloomington has worked with telecommunications carriers to enable the deployment of personal wireless service throughout the City; (2) express its agreement with comments made by groups representing municipalities, including the comments of the League of Minnesota Cities<sup>3</sup> and the National League of Cities;<sup>4</sup> (3) provide information demonstrating that further action by the Commission is not needed in order to enable small cell deployment; (4) provide information demonstrating the need for individual review of each small cell location, to illustrate that batch

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<sup>1</sup> Federal Communications Commission, *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, December 22, 2016 (Public Notice).

<sup>2</sup> Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) (Mobilitie Petition).

<sup>3</sup> Comment of the League of Minnesota Cities, *In the Matter of: Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, (filed March 8, 2017) (League of Minnesota Cities).

<sup>4</sup> Comments of the National League of Cities, *et al., in the Matter of: Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, (filed March 8, 2017) (National League of Cities).

applications are not significantly faster to process and should not be subject to a shorter timeframe; and (5) urge the Commission to reject the Petition.

These comments were approved by the Bloomington City Council on April 3, 2017.

## **INTRODUCTION**

The City of Bloomington commends the Commission for researching best practices to expand the reach and reduce the cost of wireless services. Bloomington has long been committed to facilitating the provision of telecommunication services and has actively updated the city's standards and policies to do so. Bloomington is pleased to share its experiences in response to the Commission's request for comments.

With 38.3 square miles, 38,847 housing units and 87,224 residents, Bloomington, Minnesota is the third largest city in the Minneapolis-St. Paul-Bloomington Metropolitan Statistical Area. Bloomington has long been a leader in opening its public rights-of-way for small cell antenna installations. In 2001, Bloomington amended its Code of Ordinances to allow antenna installations in the rights-of-way. Since then we have continued to update our code and our procedures to streamline the process and make it easier for wireless providers to locate in our city.

Today, Bloomington is home to 117 conventional and 21 small cell antenna sites on both public and private land for companies like Verizon, AT&T, Sprint and T-Mobile. Bloomington strongly supports the roll out of 5G wireless, which will provide greatly enhanced service to our residents, businesses and visitors. Converting to 5G will require a much denser network of antenna sites. Many wireless experts estimate there will be ten small cell antenna sites to support 5G for every one existing conventional antenna site. This is a significant increase. The City of Bloomington is supporting this roll out and is working to ensure it is accomplished safely pursuant to our responsibility to manage the rights-of-way for the benefit of the community as a whole. Additional federal regulations could prove costly and disruptive to the City of Bloomington, and as such, Bloomington urges the Commission not to make any declarations further interpreting requirements regarding how local governments may manage wireless and small cell siting in their communities.

**I. The City of Bloomington has created a process that works. A Declaratory Ruling is not necessary.**

The City of Bloomington welcomes and desires smart planning and deployment of wireless services. To that end, Bloomington has created a streamlined process for the approval of small cell wireless. In this section we describe this process in further detail to provide the Commission evidence showing that local review does not hinder the deployment of wireless infrastructure.

*The Commission asks: “We seek information from providers and local governments on the process for reviewing and making decisions on siting applications for small wireless facilities . . . we ask commenters to explain the extent to which siting review procedures for small wireless facilities are the same as those in place for macrocells.”*

Bloomington has been a leader in opening its public rights-of-way for small cell antenna installations. In 2001, Bloomington amended its Code of Ordinances to allow antenna installations in the rights-of-way subject to reasonable standards meant to protect the interests of surrounding property owners, to keep travelers safe and to ensure the rights-of-way can continue to meet the public’s needs. The purpose of that ordinance is memorialized in the code as follows:

The city desires high quality wireless communication services to accommodate the needs of residents and businesses. At the same time, the city strives to minimize the negative impacts that wireless telecommunication facilities can have on aesthetics and public safety. Due to the many services that must be delivered within its limited area, the city also strives to avoid unnecessary encumbrances within the public right-of-way. The city allows and regulates wireless telecommunication facilities outside of the public right-of-way through performance standards and height limits. The purpose of this section is to regulate wireless telecommunication facilities within the public right-of-way in a manner that balances desire for service with aesthetic, public safety and right-of-way flexibility concerns.<sup>5</sup>

The approval process for small cell installations collocated on, or replacing, existing poles in the right-of-way is entirely at the staff level, with no requirement for public hearings, neighborhood notification or City Council approval as would be the case for new macro cell tower installations. Since 2014, Bloomington has enhanced the process to create a seamless review for small cell providers seeking to locate in the right-of-way.

First, we have made information readily available. We developed a short handout, complete with a diagram, to outline the expectations and requirements for small cell applications. We also created a flowchart outlining the review process. The flowchart demonstrates how the steps in the

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<sup>5</sup> Bloomington, Minnesota Code of Ordinances Section 17.70(d)(1).

process change depending on whether the pole is owned by the city or another entity, and whether the right-of-way is managed by the city or the county.

Second, we streamline communications with city staff. We have identified a single point of contact for small cell applicants to communicate with during the application process. We created a Pole Review Committee (“PRC”) to quickly and efficiently review the small cell applications. It includes representatives from Traffic Engineering, Traffic Maintenance, Water Resources/Storm Water, Planning, Utilities, Legal, and Assessing. The idea of the committee is to get all of the city departments that might touch a new small cell installation together at same time. It is an opportunity for staff to give any feedback or ask any questions of the applicant at one time, as opposed to an applicant being contacted by each department individually, which helps streamline the process for the applicant as well as for Bloomington.

Third, we are abundantly clear about the timeline applicants can expect from the PRC. We have created an Application Submittal/Meeting Schedule/Approval chart, which identifies the meeting dates for the PRC for the entire year and the application submittal deadline prior to each meeting. Finally, based on the date an applicant submits their paperwork, the chart indicates the latest date that they can expect the PRC’s decision. An excerpt of this chart is copied below for illustration purposes:

**Small Cell Technology  
Review Committee  
PRC 2017 Application Submittal/Meeting Schedule**

<b>Application Deadline (By 2:00pm CST)</b>	<b>PRC Meeting</b>	<b>Application Approval or Denial No Later Than:</b>
January 6, 2017	January 11, 2017	February 20, 2017
January 20, 2017	January 25, 2017	March 6, 2017
February 3, 2017	February 8, 2017	March 20, 2017
February 17, 2017	February 22, 2017	April 3, 2017
March 3, 2017	March 8, 2017	April 17, 2017
March 17, 2017	March 22, 2017	May 1, 2017
March 31, 2017	April 5, 2017	May 15, 2017

***The Commission asks: “At present, how much time typically elapses between the filing of complete facility siting applications and the approval or denial of such applications by land use authorities?”***

We have established a process by which applications for small cell location within the right-of-way will be approved within 45 days but are often approved faster. However, as we will discuss later on in this comment, there is a point at which multiple applications at the same time could slow the process down. Each location must be individually evaluated, and our review capacity is not infinite.

**II. Local government siting policies have not hindered the deployment of wireless service. Delays are often caused by applicants who submit incomplete or imprecise applications and do not work with the city to resolve these issues.**

***The Commission asks: “We also seek comment on how often local land use authorities approve or deny siting applications.”***

Bloomington wants cutting-edge wireless technology for its community. Residents and businesses want it. As such, Bloomington generally does not deny applications. We have sent applications back to the applicant with a request for more information, but we continue to work with the applicant to obtain the missing information. There are many instances where we have had to ask for more information. For example:

- Some applications do not specify which pole they seek to locate upon. At times we have received maps with pins representing a general area, or lists of longitude and latitude, but no identification of a specific pole. Proper identification of the pole enables us to determine quickly if the pole is city-owned or not and allows us to help the applicant avoid spending time filing out applications that may not be needed.
- For poles that are owned by someone other than the city (such as poles owned by electricity companies, the Transportation Authority, the County, the State, or a private entity) some applicants have not obtained approval from the owner and therefore don't have permission to install small cell equipment on that pole.
- Some applications have identified a pole that is not within the right-of-way.
- Some applications have not identified the location and size of any ground-mounted equipment associated with the small cell installation.

- Some applications have not specified where the related digging and other construction activities in the right-of-way would occur. These details are important, especially matters like conduit run locations, hand hole locations, electrical run locations, location of electrical meter boxes, meter mounting heights, meter styles, etc.

One thing that has been working well for us is our efforts to work with potential applicants before they file permit applications to ensure that their proposed locations are feasible. This allows us to determine if the pole is actually city-owned, if it's a candidate for a small cell installation and if it's not we can suggest alternative locations in the same area that may better fit the applicant's needs. We've also tried to meet with providers early in their site selection process to go over our policies and procedures so they understand the process and know what to anticipate. This allows us to enter into a Master License Agreement with the provider which applies to all their small cell installations throughout the city, allowing the provider to submit all applications under one agreement, which further streamlines the process.

***The Commission asks: "We seek comment on the extent to which litigation ensues as a result of delay or denial of siting applications."***

We have not had this issue.

### **III. Additional interpretations of statutory definitions are not needed.**

#### **1. Section 253(c) preserves local authority.**

Section 253(c) preserves local authority to manage public rights-of-way. It is not a stand-alone restriction. The City of Bloomington agrees with the comment of the City and County of San Francisco, which explains that Section 253 should be read as a whole: "section 253(c) provides local governments with a safe harbor that could serve to preserve a local law that might otherwise be preempted under § 253(a)."<sup>6</sup> It is a two-part test. "First, it must be determined whether the state or local provision in question is prohibitive in effect. If the provision is not prohibitive, there is no preemption under § 253."<sup>7</sup> A telecommunications carrier "would first have to prove that the local regulatory scheme had barred or effectively barred it from providing telecommunications services.

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<sup>6</sup>Comments of the City and County of San Francisco, *In the Matter of: Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilite, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, (filed March 8, 2017) at 16 (San Francisco).

<sup>7</sup> Qwest Corp. v. City of Santa Fe, New Mexico, 380 F.3d 1258, 1269 (10th Cir. 2004).

Only then would the court look to whether the regulation and applicable fees were permissible under the safe harbor provisions of section 253(c).<sup>8</sup> As such, section (c) does not exist to create a cap on compensation, but to preserve an area of local authority. In this context, the question of what amount of compensation is fair, reasonable, and nondiscriminatory is not an appropriate question to determine on a nationwide basis.

Even if the Commission were to establish this cap, it would be a challenge to ensure it would not shift costs to local taxpayers. The City of Bloomington shares the concerns expressed by the League of Minnesota Cities which illustrate how complicated it could be to establish a national standard that truly includes all elements of the costs of managing installation of new facilities.<sup>9</sup> The consequence of setting the amount too low would be to shift the financial burden of these installations to the taxpayers.

## **2. Compensation**

We agree with the Commission and commend it for noting that “there is judicial precedent for considering the totality of the circumstances, including market-based pricing for comparable use of rights-of-way, in determining whether the compensation charged by a locality constitutes . . . ‘fair and reasonable compensation’”<sup>10</sup> We also agree with the comments of the City of New York, which note that legislative history does not support the assertion that “reasonable compensation” is limited to costs, and that interpretations of the term “just compensation” in Amendment V. to the U.S. Constitution support the same conclusion.<sup>11</sup> In addition, we agree with

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<sup>8</sup> San Francisco *supra* note 6 at 16.

<sup>9</sup> As the League of Minnesota Cities explains, “As an example of differences, in Minnesota, many communities have expended significant dollars developing cityscapes with decorative poles and main streets. Others have invested in undergrounding everything in their rights-of-way. In planning their communities, cities expend not only significant dollars on city design and planning, but also staff and elected official time. These types of planning decisions create an aesthetic look and feel relied upon by the residents and potential residents. In comparison, other cities, not uncommonly more rural in nature, may not have such intricate cityscapes, may still have wood poles and may have less crowded ROWs. These factors, along with the population differences of Minnesota’s communities and the existing location of macro networks, cause the siting requests received by each community for wireless deployment to vary greatly. Indeed, to streamline a deployment process or even limit “fair and reasonable” compensations would disregard the individualized circumstances and challenges of each community and would impede the local governmental unit’s well-established police power to regulate their ROWs and deny permits in instances of nonconformance.” League of Minnesota Cities, *supra* note 3, at 11-12.

<sup>10</sup> Public Notice, *supra* note 1, at 7, note 50.

<sup>11</sup> As explained by the City of New York, “Mobilitie’s argument that “reasonable compensation” is limited to costs is not supported by the legislative history or by the obvious comparison to the use of the term “just compensation” in Amendment V. to the U.S. Constitution. Under Mobilitie’s argument about what “compensation” means, a private property owner subject to condemnation would be entitled not to the fair market value of the property taken, but

the comments from the National League of Cities, which highlight Supreme Court precedent holding that local governments may charge rent for the use of their property if they so choose.<sup>12</sup>

We want to emphasize that small cell providers do have options other than the public right-of-way. Small cells can locate on private property, especially where light poles are already present (e.g., parking lots for schools, churches, and commercial uses). In this case, they pay rent to the private land owners.

Similar to private land owners, the public has an interest in compensation for use of its property. The taxpayer has made a significant investment in the public right-of-way. Not only in infrastructure, but in snow plowing, landscaping, installing attractive signage, keeping sidewalks clean, safe and free of trash, and putting in design features so that our streets and sidewalks are places that reflect the pride we take in our communities as a whole. Outside of the public right-of-way, property owners are compensated for leasing out space for antennas. Local taxpayers should be able to receive a similar compensation, and should not be asked to subsidize private interests who stand to profit significantly from this new service they seek to provide. As stated in our Code of Ordinances,

The city holds the rights-of-way within its geographical boundaries as an asset in trust for its citizens. The city and other public entities have a substantial investment of public funds to build and maintain the rights-of-way. It also recognizes that some persons, by placing their equipment in the right-of-way and charging the citizens of the city for goods and services delivered thereby, are using this property held for the public good. Although such services are often necessary or convenient for the citizens, such persons receive revenue and/or profit through their use of public property. Although the installation of such service delivery facilities are in most cases necessary and proper use of the right-of-way, the city must regulate and manage such uses for the common good.

To provide for the health, safety and well-being of its citizens and to ensure the structural integrity of its streets and the appropriate use of rights-of-way, the city

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rather to something like the private owner's transaction expenses in turning over its property to the government. Note, in this regard, that the City's poletops are a prominent, limited and valuable resource, just as private property is a limited and valuable resource, and if not used for wireless siting is potentially available for alternative public benefit and/or revenue-generating purposes, the value of which will vary widely from community to community and location to location, as with any property." Comments of the City of New York, *In the Matter of: Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilite, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, (filed March 8, 2017) at 8 (City of New York).

<sup>12</sup> National League of Cities, *supra* note 4, at 17-21.



strives to keep its rights-of-way in a state of good repair and free from unnecessary encumbrances. Although the general population funds the majority of the upkeep of the rights-of-way, one of the causes for the early and excessive deterioration of its rights-of-way is frequent excavation.<sup>13</sup>

Recently, the wireless industry has begun to pursue legislation in states across the nation that attempts to limit local control to set appropriate standards and local ability to recover market-based rates on behalf of the taxpayer. Should these efforts succeed, the net effect would be to transfer massive amounts of future revenue from the taxpayer to the wireless providers. Because wireless providers are not public utilities like many other right-of-way users, there is no assurance that wireless providers would pass along these massive savings to their users. Mobilitie's petition is problematic for similar reasons.

We would like to note that Mobilitie is not raising an issue related to gaps in coverage. As they note in their comment, "small cells are not installed to eliminate coverage gaps but to enhance network capacity, speeds, and reliability."<sup>14</sup> The issue, in large part, is about expanding capacity to facilitate new uses for wireless, so that individuals can connect more of their devices to the internet and in turn, pay more to the companies who provide wireless internet access. This includes devices like internet-connected coffee makers, thermostats, biometric watches, refrigerators, and even gas grills with wireless meters on their propane tanks. The more the public relies upon 5G, the more the providers of 5G stand to profit. Petitioners want the Commission to set a low number for what is "reasonable compensation" to make it cheaper for them to roll out this new product. This is understandable, so long as that cost is not shifted to the taxpayers.

Costs can vary by individual pole location, by locality, and by region. As illustrated in the City of New York's comment, the pole fees within their city vary by area.<sup>15</sup> One can assume that the more desirable areas are more valuable, and therefore cost more. This type of local variation suggests that rent for use of space in the public right-of-way is an issue better left to individual local determination.

Even if we could calculate a formula, the market is more efficient at determining the correct value of this limited resource. Fair market pricing would encourage responsible and efficient use

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<sup>13</sup> Bloomington, Minnesota Code of Ordinances, Section 17.64.

<sup>14</sup> Mobilitie Petition, *supra* note 2 at 3.

<sup>15</sup> City of New York, *supra* note 8, at 6.

of the public right-of-way. Bloomington agrees with the comment made by the City of New York, which discusses the incentives that would be created by capping compensation for use of the right-of-way.<sup>16</sup> If the Commission set “fair and reasonable compensation” at a rate below market value, it is likely wireless providers would crowd the public way instead of spreading antennas throughout the city on both private and public space. As the City of New York explains, “wireless entities [would] be artificially steered toward this particular resource, use it inefficiently, and reduce investment in technological innovation that use alternative sources.”<sup>17</sup> This would discourage innovation and add pressure to already challenging management of the right-of-way. In addition, it would undercut investments made by private businesses who seek to host small cells on their properties.

Space in the right-of-way is limited, and it exists for the benefit of the entire community. Local governments invest heavily in right-of-way management, as is their responsibility to the public. Fair market compensation captures the true value of this space. It ensures that private business investments are not undercut, and that taxpayers receive fair returns on the investments they have made in the right-of-way.

**3. “Reasonable period of time” must take into account that even in batch applications, locations must be reviewed individually.**

To serve the public’s interests, local governments require adequate time to review applications. We strongly believe that no more restrictive time limits are needed. Cities understand the importance of implementing the technology and will do what they can, given their specific circumstances, to move it forward.

Many questions about cell siting are unique to each particular location, and cannot be streamlined by batch applications. Stricter time limits combined with multiple applications at one time could require cities to either hire more staff, at great cost to the taxpayer, or spend less time

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<sup>16</sup> “To access private property for wireless systems, providers must negotiate market prices, terms and conditions with private property owners who are unfettered in their discretion regarding access to their properties. Providers are incentivized to develop and use the most efficient systems and technologies to minimize the need for such resources. If in contrast, local governments are limited from exercising the same scope of authority with respect to the sites they own and manage, as private property owners and managers do with respect to their sites, wireless entities will be artificially steered toward this particular resource, to use it inefficiently, and to reduce investment in technological innovation that use alternative sources.” City of New York, *supra* at 6.

<sup>17</sup> City of New York, *supra* at 6.

ensuring that the public's interests are protected. Batch applications will not be much faster than individual applications unless the cells will be located on the exact same pole.

Bloomington would like to share a few examples of issues and questions that often come up in an application review which are specific to each small cell location, to illustrate why batch applications will still require individual review of each site:


- Can the existing pole safely support the antennas and equipment? We have received applications that include structural analyses declaring a pole appropriate for small cell location. After investigation by our staff, we discovered rust, holes, and degraded welds making the pole inappropriate for carrying additional weight.
- If a new more robust pole is required will the new pole base restrict the path for sidewalk users? In some areas of the city we have a limited amount of space between a pole base and the edge of sidewalk, face of building, etc. If a larger pole were to be installed that required a larger foundation would that larger base restrict the passable space beyond the allowable minimum distance?
- Will ground equipment block sight lines for vehicles, making the roadway less safe? Will ground equipment be set-back far enough from the edge of the roadway and sidewalks to allow for snow removal and snow storage? What will it look like? In one situation, the location of the electrical meter wasn't shown on the plans submitted. After installation a homeowner called with a complaint that it was located directly in front of their picture window and impaired their view. Bloomington staff met with the provider to relocate the meter to a more agreeable location.
- Is the electrical service at that location compatible? How will it be paid for? We have areas of city-owned lights where we pay a flat rate per month to the power company; these locations are not metered. The monthly rate Bloomington pays is based on the amount of electricity needed to power the light plus the cost to re-lamp. If a small cell unit were to be installed on one of these lights and tap into the light's power supply it is not clear how Bloomington would compensate the power company for the additional power draw. It is possible these lights would need to be metered separately, billed, and paid for separately.

- Does the electrical service cabinet at that location have additional capacity? We have found complications because the existing service cabinet does not have capacity to handle the additional electrical load.
- How will electricity and fiber service run to the pole? Will additional digging have to occur to route these lines? Can that be accomplished without too much disruption to other uses of the right-of-way?
- Can the light pole or traffic signal in question safely be removed for a period of time to allow a replacement pole to be erected?
- Is there space available for the installation or will it interfere with the ability of other important public utilities (water, sewer, storm sewer, gas, electric, etc.) to serve their users?
- Are there overhead power lines in that location?
- Do proposed conduits for fiber and electricity interfere with or conflict with existing underground utilities? In most applications approved to date the applicant didn't initially have any storm or sanitary infrastructure shown on their plans, and there were catch basins and catch basin runs that already existed in the areas where they were proposing their work. The fiber and electrical conduit they were proposing would have run directly through our existing infrastructure. Fortunately our Storm Water staff at the PRC meeting and pointed this out to the applicant so they could correct it and resubmit edited plans that would not disrupt existing infrastructure in the rights-of-way.

#### **IV. Conclusion**

Bloomington thanks the Commission for its efforts to better understand the practices and policies surrounding local governments' management of the public rights-of-way. We strongly urge the Commission to consider our comments, as well as those submitted by communities across the country, before taking any action that may adversely affect local government authority.

Respectfully,

  
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April 3<sup>rd</sup>, 2017

Submitted by:

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